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COMMISSION ON HUMAN RIGHTS

Inter-sessional open-ended working group
for the elaboration of a draft optional
protocol to the Convention on the Rights
of the Child on the sale of children,
child prostitution and child pornography
Sixth session
24 January-4 February 2000

COMMENTS ON THE REPORT OF THE WORKING GROUP

Note by the Secretary-General

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Introduction

1. In paragraph 13 (b) (iii) of its resolution 1999/80 entitled "Rights of the Child", the Commission on Human Rights requested the Secretary-General to transmit the report of the Working Group to Governments, relevant United Nations bodies and specialized agencies, the Committee on the Rights of the Child, the relevant Special Rapporteur and intergovernmental and non-governmental organizations, and to invite their comments in time for circulation prior to the next session of the Working Group.

2. Pursuant to this resolution, the Secretary-General, on 20 September 1999, addressed requests to Governments, intergovernmental and non-governmental organizations concerned, as well as to the Special Rapporteur on the sale of children, child prostitution and child pornography and the Committee on the Rights of the Child for their comments.

3. As of 14 December 1999, replies have been received from the Governments of Belarus and New Zealand.

4. Replies were also received from the Council of Europe, the Food and Agriculture Organization of the United Nations, the International Labour Office, the United Nations Centre for International Crime Prevention and the United Nations Children's Fund.

5. Comments were received from the Universal Postal Union.

6. The present report contains a summary of the substantive replies received. Any additional replies will be reproduced in an addendum to the present report.

I. COMMENTS RECEIVED FROM STATES

Belarus

[Original: Russian]
[25 November 1999]

The United Nations Convention on the Rights of the Child of 20 November 1989 is in force in Belarus.

The right to protection from torture or other cruel, inhuman or degrading treatment or punishment is enshrined in articles 9, 24, 31 and 32 of the Rights of the Child Act.

1. Article 9: "The State shall preserve the inviolability of the child's person and afford protection against all forms of exploitation, physical or mental violence, cruel, harsh or negligent treatment, sexual exploitation or sexual perversion, including on the part of parents, persons acting in loco parentis or relatives ...";

2. Article 14 of the Rights of the Child Act imposes on parents and persons acting in loco parentis responsibility for the child and for the creation of the conditions required for his or her upbringing, full development, education, the strengthening of his or her health and

preparation for an independent life in the family and in society, as well as responsibility for violations of legislation by their children;

3. Article 24: "Every child has the right to protection of his or her honour and dignity, which are upheld by the Constitution of Belarus ...";

4. Article 31: "It is not permitted to use violence, threats or other unlawful acts against juveniles ...";

5. Article 32 of the Act lays down the right to humane treatment, protection of health, provision of basic education and vocational training;

6. Article 33 of the Act guarantees the adoption of measures by the State to combat the illicit transfer and non-return of children abroad, to prevent the abduction, trade or trafficking of children, for any purpose and in any form, in accordance with current legislation and the rules of international law.

Criminal law in Belarus classifies the following as offences:

1. Abduction or substitution of another person's child for mercenary purposes or for other base motives (Criminal Code, art. 123);

2. Beatings or other actions which constitute torture (Criminal Code, art. 111);

3. Malicious avoidance by parents of the payment of funds ordered by a court or a judge for the maintenance of minors or of the maintenance of dependent minors who are unable to work (Criminal Code, art. 120);

4. Incitement of other persons to use narcotic substances (Criminal Code, art. 291-4);

5. Rape of a minor (Criminal Code, art. 115);

6. Sexual intercourse with a person who has not reached sexual maturity (Criminal Code, art. 117);

7. Depraved actions towards a person aged under 16 (Criminal Code, art. 118).

The production and distribution of pornographic and counterfeit articles, as well as those containing symbols of violence and brutality, are offences under administrative and criminal law.

Article 162 of the Code of Administrative Offences lays down that the malicious failure of parents or persons acting in loco parentis to fulfil their obligations in respect of the upbringing and education of their children is an offence under administrative law.

New Zealand

[Original: English]
[30 November 1999]

The New Zealand Government welcomes this opportunity to submit views on the report of the Working Group on the draft optional protocol on the sale of children, child prostitution and child pornography (E/CN.4/1999/74). Our comments relate to annex I and annex II to the report, which we consider the most useful basis for discussions at the forthcoming meeting of the Working Group.

Regarding the scope of "sale of children", New Zealand is prepared to countenance a prohibition broader than the sale of children "for sexual purposes", though this should remain the focus of the optional protocol, provided there is no conflict with the Hague Convention on Intercountry Adoption, or our own domestic legislation. We consider there is a need to differentiate between legitimate payments made to cover the expenses incurred in the arranging of an adoption, and payments or considerations made to illicitly purchase children.

The agreed definition needs to be explicit in defining the sale of children as the transfer of a child in exchange for payment or benefit for that transfer. New Zealand supports the proposed definition which refers to "transferring illicitly ... for remuneration" as a means of distinguishing legal adoption from the sale of a child. We note that the United States has proposed that the preamble state that the protocol does not prejudice adoption under the Hague Convention. New Zealand would support the inclusion of this statement for added clarity.

On pornography, New Zealand favours a broad definition of child pornography, including real and simulated acts and audio and visual media. We would also favour a broad prohibition including an offence of possession.

On extradition, regarding paragraph 5, the "extradite or prosecute" clause is relatively common in international instruments and we could live with its inclusion, but would prefer the deletion of the text in the final square brackets, since the double criminality rule is not relevant to a decision to prosecute (as opposed to a decision to extradite).

On seizure and confiscation, we are confortable with paragraph 6, but consider that paragraph 7 is unnecessary. If 6 (a) is not considered broad enough, "goods" could be replaced by "property".

On the protection of children, we are concerned that some of the provisions may be too broad, for example clause 2 (c). as New Zealand does not allow the views of victims to be presented and considered at all stages of the criminal justice system (for example, at sentencing the victim may make a statement outlining how the offence has impacted upon him or her but may not express views on the appropriate sentence in the case). New Zealand would favour some limits being placed on this, for example, by stating "where this is appropriate".

II COMMENTS RECEIVED FROM UNITED NATIONS BODIES, SPECIALIZED AGENCIES AND INTERGOVERNMENTAL ORGANIZATIONS

Council of Europe

[Original: English]
[13 December 1999]

The work on the draft protocol is an important step and a crucial endeavour in which Governments, NGOs and international organizations should join. It clearly reflects both the new political impetus for the Council of Europe's activities in favour of children and the concerns expressed in recommendation No. R (91) 11 of the Committee of Ministers on sexual exploitation, pornography and prostitution of, and trafficking in, children and young adults.

With a view to maintaining the momentum created by the 1996 Stockholm World Congress against Commercial Sexual Exploitation of Children, the Council of Europe's Committee of Ministers established, at its 679th meeting (September 1999), the Committee of Experts on the Protection of Children against Sexual Exploitation (PC-SE) [1]. The Committee is entrusted with, inter alia, reviewing the implementation of recommendation No. R (91) 11 and its updating in order better to respond to today's problems. In doing so, the Committee is asked to bear in mind in particular the ongoing work of the United Nations Working Group on the draft protocol concerned.

As concerns the use of the Internet for the purpose of sexual exploitation of children, the Committee of Experts on Crime in Cyberspace (PC-CY) is currently preparing special provisions on the distribution of child pornography through the Internet, which will be included in a convention on cybercrime. Negotiations on this convention are expected to be concluded in 2000.

In addition to the above, reference is made to the Multidisciplinary Group on Action against Trafficking in Human Beings for the Purpose of Sexual Exploitation (EG-S-TS), which finalized its work on a recommendation which addresses relevant aspects of child protection.

Food and Agriculture Organization of the United Nations

[Original: English]
[12 November 1999]

The World Food Summit Plan of Action makes specific reference to the Convention on the Rights of the Child in Commitment 1, Objective 1.4, stating that it is important to "give special attention to promoting and protecting the interests and needs of the child, particularly the girl child, in food security programmes, consistent with the World Summit for Children [and the] Convention on the Rights of the Child". The rights of the child and the special challenges faced

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[1] The terms of reference of the Committee were enclosed and are available for consultation in the secretariat.

by children in rural societies are further highlighted in several paragraphs, as children are often particularly vulnerable and disadvantaged in regions or situations with food insecurity.

Naturally, the WFS Plan of Action considers violations of the rights of the child in relation to FAO mandates regarding food security, nutrition and rural development, and therefore rather remote from such special issues as child prostitution and pornography or child involvement in armed conflicts. However, it is important to keep in mind that poverty, the lack of food security and the related search for survival strategies certainly have been and continue to be, at specific times and places, factors in social evils such as those targeted in the draft optional protocols.

To conclude, while FAO certainly supports efforts towards a better legal protection of children against exploitation, as aimed at in the draft optional protocol, it would like to recall the need for also tackling its root economic and social causes.

International Labour Office

[Original: English]
[15 November 1999]

On 17 June 1999, the 174 States members of ILO crowned the 87th annual International Labour Conference with the unanimous adoption of the Worst Forms of Child Labour Convention, 1999. This is a decisive step towards liberating scores of millions of children from prostitution and pornography and forcible recruitment for armed conflict, as well as from slavery, trafficking, debt bondage and hazardous work.

This new ILO Convention (No. 182) covers all persons under the age of 18, in line with the definition of the child under the Convention on the Rights of the Child. It calls for "immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency".

Its definition of the worst forms of child labour comprises:

(a) All forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;

(b) The use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;

(c) The use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;

(d) Work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children (article 3 of Convention No. 182, emphasis added).

Thus, the new ILO Convention calls for immediate action to eliminate, among other things, the sale and trafficking of children, child prostitution and pornography, as well as the forced or compulsory recruitment of children for use in armed conflict. As to the exact types of work to be prohibited as hazardous work under item (d) above, the Convention leaves the matter to national determination after consultation with employers' and workers' organizations and taking into consideration relevant international standards. Should a State decide that any participation of children in armed conflict is harmful, it is possible to include this in the list of work that is likely to harm the health, safety and morals of a child and thus ensure that immediate measures are taken to prohibit and eliminate it.

The Convention requires ratifying States to design and implement programmes of action to eliminate the worst forms of child labour as a priority and to establish or designate appropriate mechanisms for monitoring implementation of the Convention, in consultation with employers' and workers' organizations. It also provides that ratifying States should take measures for prevention, provide support for the removal of children from the worst forms of child labour and for their rehabilitation, ensure access to free basic education or vocational training for all children removed from the worst forms of child labour, identify children at special risk, and take account of the special situation of girls.

As one of its innovative features, this new Convention calls for international cooperation or assistance in the efforts to make its provisions really applied including support for social and economic development, poverty eradication and education. It also provides for broad consultation among Governments, workers and employers - the "social partners" in the tripartite ILO structure.

An accompanying recommendation (No. 190) urges ILO member States to declare the worst forms of child labour, including the use of a child for the production of pornography, criminal offences and impose penal sanctions on violations of national laws. The recommendation, which offers a wide range of guidelines for actions for implementation, calls for international efforts in gathering and exchanging information on criminal offence, including those involving international networks, and suggests providing for the prosecution in a given country of nationals who commit such offences as those concerning child prostitution and pornography, even when the offences are committed in another country.

Upon the adoption of this new Convention, the ILO has immediately launched a worldwide campaign for its ratification - the process by which the Convention becomes formally binding in terms of international law, obliging the Government to translate it into national law and practice. Once an ILO Convention is ratified, its application is monitored internationally through a system of regular reporting and Governments must account for all allegations of violations.

In addition, the new Convention has already been regarded as one of the ILO "core conventions" along with those concerning freedom of association and the right to collective bargaining, the elimination of forced or compulsory labour, non-discrimination in respect of employment and occupation, and the effective abolition of child labour as a whole.

These Conventions cover the fundamental principles and rights at work which were agreed upon by the World Summit for Social Development in Copenhagen in March 1995. Such principles and rights are the subject of a solemn Declaration adopted by the International Labour Conference in June 1998 with a follow-up procedure.

In the area of technical cooperation, ILO has been assisting member countries in their fight against child labour through practical projects in the field, through its International Programme on the Elimination of Child Labour (IPEC), launched in 1992.

The new Convention (No. 182) reflects widespread recognition over the past years and a global consensus that there should be an immediate end to the worst forms of child labour, including the use of a child in pornography and the forced or compulsory recruitment of children in armed conflicts. Many initiatives are already being taken by ILO member countries towards the ratification of this Convention. Its ratification signifies countries' commitment to national and global action against the worst forms of child labour and should be sought all over the world. So far, the very first ratification, by Seychelles, was registered on 28 September 1999; the Convention will enter into force 12 months after the registration of its second ratification.

United Nations Centre for International Crime Prevention

[Original: English]
[15 November 1999]

General observations

The Centre fully appreciates the work involved in this very important task of drafting the optional protocols to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography and on involvement of children in armed conflicts.

The Centre welcomes the draft optional protocols as an important step forward in establishing the rights of children, who are often the targets of the worst forms of exploitation. The Centre particularly welcomes the draft protocol on involvement of children in armed conflicts as an advancement of the protection of children.

The Centre would like to draw the attention of the High Commissioner to the draft convention against transnational organized crime and two of the protocols supplementing it, namely the draft protocol to prevent, suppress and punish trafficking in persons, especially women and children and the draft protocol against the smuggling of migrants by land, air and sea. The purpose of the draft convention and its protocols is to combat organized crime. However, the draft protocols on trafficking in persons and smuggling of migrants have a specific aim to protect human beings, in particular children, against any form of trafficking. In this perspective, they have a common aim with the draft optional protocols on the Convention on the Rights of the Child.

Since the elaboration of the Convention against transnational organized crime and its protocols is taking place simultaneously with that of the draft optional protocols to the Convention on the Rights of the Child, it is important for these instruments to complement each

other. Therefore, the Centre offers the following specific observations based on the current status of the draft convention against transnational organized crime and its protocols.

Specific observations

The Centre welcomes the inclusion of "or any part of the body of the child" in the text, as the extraction of body organs is a particularly heinous form of trafficking in and sale of children. The Centre believes that it should be covered under the draft optional protocol as a form of sale of children, even if a possibility exists for a separate instrument covering this matter in the future. While the scope of the draft protocol against trafficking in persons is still being considered, inclusion of extraction of body organs as a form of exploitation is being discussed.

In the definition in annex I, one of the requirements for the sale of children is that it be "for remuneration". In the context of the "sale of children", some element of remuneration should be present. However, remuneration should be interpreted as widely as possible and should not be confined to monetary gain. Therefore, it should include non-monetary gains such as receipt of goods and expectation of future benefit, including advancement of the offender's lifestyle or status.

With reference to annex II, the Centre has the following comments regarding extradition and mutual legal assistance. The Centre is aware that the draft optional protocol is not a law enforcement instrument. However, since the provision on extradition can be used as a legal basis for extradition in the absence of a treaty, basic minimum requirements should be included. In this context, the Centre refers to the draft convention against transnational organized crime (A/AC.254/4/Rev.4, arts. 10 and 14).

In particular, the Centre believes that it is important to limit grounds for refusal of request for extradition to "situations where substantial grounds leading its judicial or other competent authorities to believe that compliance would facilitate the prosecution or punishment of any person on account of his race, religion, nationality or political opinions, or would cause prejudice for any of those reasons to any person affected by the request".

The use of extradition should be promoted, and should encourage the possibility for extradition on a case-by-case basis in the absence of a treaty. The request for extradition should also be reviewed expeditiously.

With reference to mutual legal assistance, it should be noted that in the present text, under annex II, there is no mention of the national competent authority through which the mutual legal assistance is possible. In particular, the Centre believes the following requirements are essential: to designate an authority or when necessary, authorities which shall have the responsibility and power to execute requests for mutual legal assistance; and to establish a mechanism or reporting system so that the States parties are able to identify and communicate with such authority or authorities.

United Nations Children's Fund

[Original English]
[8 November 1999]

For UNICEF, the concern has been and continues to be, that the optional protocol must achieve the highest possible standards in this area and must strengthen the standards in the Convention on the Rights of the Child. By ratifying the Convention, 191 States have committed themselves to take effective measures to protect all children from all forms of sexual exploitation and sexual abuse. No action must undermine the strength of this obligation, and it remains the responsibility of the working groups to create an instrument which strengthens the level of protection ensured by the Convention, as well as reinforcing the role played by the Committee responsible for monitoring its implementation.

In this regard, the optional protocol should focus primarily on (i) the criminalization of the perpetrators of the sale of children, child prostitution and child pornography, (ii) the protection and rehabilitation of the child victim and (iii) the incorporation of the principle of extra-territoriality in national legislations.

Sale of children, child prostitution and child pornography are per se harmful activities and contemporary forms of slavery. In the light of the definition of the child contained in the Convention, children shall be protected from sexual exploitation until the age of 18 years. To this end, measures addressing prevention, protection, recovery and social reintegration of child victims need to be adopted and enforced, together with the criminalization of offenders.

In this regard, the optional protocol should be based on the definitions used by the Convention in articles 34 and 35. The Convention sets the fundamental normative framework in this area. National legislations should adequately reflect the provisions of the Convention and penalize these violations of children's rights.

In this area, children are mainly the victims and should be envisaged as such. The priority issue in this debate is to ensure that criminal sanctions are established to punish individuals and organizations which induce, coerce or use children for any form of sexual exploitation. The criminalization of the child victims should be avoided and adequate programmes promoted to ensure their protection, as well as their physical recovery and social rehabilitation. Information and education are especially important preventive measures to create awareness and mobilize all relevant actors to combat child sexual exploitation, including child prostitution and pornography.

In the view of UNICEF, it is important that the general principles of the Convention continue to guide the efforts of the Working Group: the best interests of the child should be a primary consideration in all actions taken, children should be provided with an opportunity to express their views, particularly within the framework of any administrative or judicial proceeding affecting them, and no child should be discriminated against, including on the basis of gender, national or social origin. In this regard, it is important to acknowledge that gender

discrimination can place girls at greater risk of sexual exploitation and that they have specific needs for rehabilitation. UNICEF will continue to actively participate in this drafting exercise and in the discussions of the Working Group.

III. COMMENTS RECEIVED FROM OTHER ORGANIZATIONS

Universal Postal Union

[Original: English]
[3 November 1999]

Two proposals addressing the issue of child pornography were adopted by the Universal Postal Union's 22nd Congress, which was held from 23 August to 15 September 1999 in Beijing, China. The first, a resolution, reinforces United Nations interagency and national government efforts to discourage production, distribution, importation, exportation or possession of child pornography material. It is also intended to provide postal administrations with the necessary support to combat the increased use of the international postal network by criminals to disseminate child pornography material.

The second proposal is intended to urge the Governments of Union member countries to take measures under their national law to suppress the transmission by post of articles of a paedophilic nature or of a pornographic nature using children.[2]

The Universal Postal Union and its Postal Security Action Group are committed to combating international traffic in child pornography material through the postal services.

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[2] The text of both proposals was provided and is available for consultation in the secretariat.